



## DEPARTMENT OF THE TREASURY

### Financial Crimes Enforcement Network

#### 31 CFR Part 1010

#### RIN 1506-AB56

### Orders Imposing Additional Reporting and Recordkeeping Requirements

**AGENCY:** Financial Crimes Enforcement Network (“FinCEN”), Treasury.

**ACTION:** Final rule.

**SUMMARY:** FinCEN is issuing this final rule to update its regulation to reflect amendments to the underlying statute concerning the authority of FinCEN to issue orders imposing additional reporting and recordkeeping requirements on financial institutions and nonfinancial trades or businesses in a geographic area.

**DATES:** *Effective Date:* [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** The FinCEN Regulatory Support Section at (800) 767-2825 or electronically at <https://www.fincen.gov/contact>.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Currency and Foreign Transactions Reporting Act of 1970, as amended, is the legislative framework commonly referred to as the Bank Secrecy Act (BSA).<sup>1</sup>

In 1988, the Anti-Drug Abuse Act amended the BSA, codified in relevant part at 31 U.S.C. 5326, to authorize the Secretary to impose additional reporting and recordkeeping requirements on domestic financial institutions in a geographic area.<sup>2</sup> This

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<sup>1</sup> The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1960, 31 U.S.C. 5311–5314 and 5316–5336, and notes thereto, with implementing regulations at 31 CFR chapter X.

<sup>2</sup> Pub. L. 100–69, Title VI, Sec. 6185(c) (Nov. 18, 1988) (codified at 31 U.S.C. 5326).

grant of authority to the Secretary did not require the promulgation of an implementing regulation, and therefore was, and continues to be, self-executing.

Nevertheless, in 1989, Treasury issued a regulation incorporating the terms of Section 5326 that were in effect at that time. The regulation mirrored the statute, with the addition of certain clarifying and procedural language. *See* 54 FR 33675 (Aug. 16, 1989) (now codified at 31 CFR 1010.370).<sup>3</sup> For example, the regulation substituted “and/or” for “and” in the first paragraph to make clear, consistent with the statute, that the Secretary could impose reporting or recordkeeping requirements upon a finding that such requirements are necessary, but need not do both. The regulation also interpreted the statutory phrase “geographic area” to mean “any area in one or more States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, the Trust Territory of the Pacific Islands, the territories and possessions of the United States, and/or political subdivision or subdivisions thereof . . . .” In addition, the regulation specified certain procedures, including that the Secretary would direct any order to the Chief Executive Officer of a reporting financial institution and would prescribe certain information in the order.

In subsequent years, Section 5326 was amended three times in a manner that expanded the Secretary’s authority. In 1992, the Annunzio-Wylie Anti-Money Laundering Act amended Section 5326 by, among other things, prohibiting financial institutions from disclosing the existence of an order to any person except as prescribed by the Secretary.<sup>4</sup>

In 2001, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“USA PATRIOT Act”)

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<sup>3</sup> The original regulation was codified at 31 CFR 103.26. In 2011, FinCEN transferred its regulations from 31 CFR part 103 to 31 CFR chapter X.

<sup>4</sup> Pub. L. 102–550, Title XV, Sec. 1562 (Oct. 28, 1992) (now codified at 31 U.S.C. 5326(c)).

extensively amended the BSA, including Section 5326 by adding “nonfinancial trade or business” after “financial institution” where that phrase appears, thereby authorizing the Secretary to issue orders to nonfinancial trades or businesses in addition to financial institutions. The Act also amended Section 5326 to extend the maximum period for an order (unless renewed) from 60 days to 180 days.<sup>5</sup>

In 2017, the Countering America’s Adversaries Through Sanctions Act further amended Section 5326. This Act amended Section 5326’s original title (“Records of certain coin and currency transactions”) by striking out the phrase “coin and currency” before “transactions.” The Act also replaced the reference to any “coins,” “currency,” and “monetary instrument” with the word “funds,” thereby making clear that a transaction need not involve only coin, currency, or monetary instruments to be covered under an order. The section was also amended to change the Secretary’s required finding that an order be “necessary to carry out the purposes of this subtitle *or* to prevent evasions thereof.” In replacing “and” with “or,” this amendment thereby required one such finding, but not both.<sup>6</sup>

The elements of the regulation that incorporated the terms of the statute in 1989 were not intended to limit the Secretary’s authority under the statute. Accordingly, as subsequent amendments described above have expanded the Secretary’s authority, FinCEN has understood the authority to be coextensive with the statute. To avoid any potential confusion regarding FinCEN’s authority under the statute, this final rule updates the regulation to reflect the subsequent statutory amendments. This rule does not materially amend the other provisions in the regulation, except for one amendment to FinCEN’s procedure for directing orders to chief executive officers. The rule amends that procedure to conform it to the amended statute by adding “nonfinancial trades or

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<sup>5</sup> Pub. L. 107–56, Title III, Secs. 353(d), 365(c)(2)(B) (Oct. 26, 2001) (now codified at 31 U.S.C. 5326(d)).

<sup>6</sup> Pub. L. 115–44, Title II, Sec. 275(a) (Aug. 2, 2017) (codified at 31 U.S.C. 5326).

businesses” after “financial institution” in the paragraph where the procedure is described.

## **II. Section-by-Section Analysis**

### *A. Section 1010.370 Section Title*

The section heading is changed from “Reports of certain domestic coin and currency transactions” to “Reports of certain domestic transactions” to align with the statutory Section Title.

### *B. Section 1010.370(a)*

Paragraph (a) has been divided into three parts: (a)(1), (2), and (3). The revised paragraph (a)(1) contains the language in current § 1010.370(a), but with the following additions and substitutions of terms that are reflected in 31 U.S.C. 5326(a): “chapter or to” is substituted for “chapter and to”; “, or any domestic nonfinancial trade or business or group of domestic nonfinancial trades or businesses,” is added after “group of domestic financial institutions”; “transfer of funds (as the Secretary may describe in such order)” is substituted for “transfer of United States coins or currency (or such other monetary instruments as the Secretary may describe in such order)”; and “or group of domestic financial institutions, or domestic nonfinancial trade or business or group of domestic nonfinancial trades or businesses” is added after “such financial institution”, and further adds “nonfinancial trade or business” after “financial institution” to clarify FinCEN’s procedure for directing orders to chief executive officers, if any.

Paragraphs (a)(2) and (3) reflect the language set forth in 31 U.S.C. 5326(b).

### *C. Section 1010.370(b)*

Paragraph (b) contains the language in current § 1010.370(b), but substitutes “funds” for “currency” and “currency and/or monetary instruments” to reflect the use of the term “funds” throughout 31 U.S.C. 5326.

### *D. Section 1010.370(d)(1)*

Paragraph (d)(1) contains the language in current § 1010.370(d)(1), but replaces “60 days” with “180 days,” to reflect the language in 31 U.S.C. 5326(d).

*E. Section 1010.370(e)*

New paragraph (e) reflects the nondisclosure language that is set forth in 31 U.S.C. 5326(c).

### **III. Administrative Procedure Act**

The Administrative Procedure Act (APA) (codified in relevant part at 5 U.S.C. 553), generally requires that agencies give interested persons an opportunity to participate in a rulemaking by the submission of comments, except when, among other reasons, the agency is amending its own “rules of agency organization, procedure, or practice” or the agency finds good cause that notice and public procedure are “impracticable, unnecessary, or contrary to the public interest.” Likewise, the APA requires a delayed effective date for a rule except under certain conditions, including rules of agency procedure, and as provided by the agency for good cause found and published with the rule.

FinCEN finds that public procedure is unnecessary, as this final rule merely updates the regulation to reflect the terms set forth in the underlying statute in order to avoid any potential confusion regarding FinCEN’s statutory authority under Section 5326. Because the final rule conforms the regulation to the statute and reflects no discretionary or substantive determination, public procedure would not inform this rule. For similar reasons, FinCEN also finds that a delayed effective date is unnecessary. Because FinCEN understands its authority to be coextensive with the statute, this update to the regulation does not alter FinCEN’s authority and merely provides clarity to the public.

In conforming the regulation to the statute, this rule also adds the phrase “nonfinancial trades or businesses” after “financial institution” in the provision relating to

FinCEN's procedure for directing orders to chief executive officers. This update does not change the procedure specified in the regulation, but only updates it to reflect the statute's inclusion of "nonfinancial trades or businesses." FinCEN finds that public procedure and a delayed effective date are unnecessary for this amendment because it amends a rule of agency procedure, and in any event, merely conforms that rule to the statute.

#### **IV. Regulatory Flexibility Act**

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

#### **V. Executive Order 12866**

This final rule is not a significant regulatory action under section 3.f. of Executive Order 12866.

#### **VI. Paperwork Reduction Act**

The collection of information contained in this rule has been reviewed and approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), and has been assigned OMB Control Number 1506–0056. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number.

#### **List of Subjects in 31 CFR Part 1010**

Administrative practice and procedure, Banks, Banking, Currency, Foreign banking, Foreign currencies, Investigations, Penalties, Reporting and recordkeeping requirements, Terrorism.

#### **Authority and Issuance**

For the reasons set forth in the preamble, part 1010 of chapter X of title 31 of the Code of Federal Regulations are amended as follows:

#### **PART 1010 – GENERAL PROVISIONS**

1. The authority citation for part 1010 is revised to read:

**Authority:** 12 U.S.C. 1829b and 1951-1960; 31 U.S.C. 5311-5314 and 5316-5336; title III, sec. 314, Pub. Law 107-56, 115 Stat. 307; sec. 701, Pub. L. 114-74, 129 Stat. 599.

2. Section 1010.370 is amended by revising the section heading and paragraphs (a), (b), and (d)(1) and adding paragraph (e) to read as follows:

**§ 1010.370 Reports of certain domestic transactions.**

(a)(1) If the Secretary of the Treasury finds, upon the Secretary's own initiative or at the request of an appropriate Federal or State law enforcement official, that reasonable grounds exist for concluding that additional recordkeeping and/or reporting requirements are necessary to carry out the purposes of this chapter or to prevent persons from evading the reporting/recordkeeping requirements of this chapter, the Secretary may issue an order requiring any domestic financial institution or group of domestic financial institutions, or any domestic nonfinancial trade or business or group of domestic nonfinancial trades or businesses, in a geographic area, and any other person participating in the type of transaction, to file a report in the manner and to the extent specified in such order. The order shall contain such information as the Secretary may describe concerning any transaction in which such financial institution or group of domestic financial institutions, or domestic nonfinancial trade or business or group of domestic nonfinancial trades or businesses is involved for the payment, receipt, or transfer of funds (as the Secretary may describe in such order) the total amounts or denominations of which are equal to or greater than an amount which the Secretary may prescribe.

(2) The Secretary may, by regulation or order, require any depository institution (as defined in section 3(c) of the Federal Deposit Insurance Act)—

(i) To request any financial institution or nonfinancial trade or business (other than a depository institution) which engages in any reportable transaction with the

depository institution to provide the depository institution with a copy of any report filed by the financial institution or nonfinancial trade or business under the Title 31 provisions of the Bank Secrecy Act with respect to any prior transaction (between such financial institution or nonfinancial trade or business and any other person) which involved any portion of the funds which are involved in the reportable transaction with the depository institution; and

(ii) If no copy of any report described in paragraph (a)(2)(i) of this section is received by the depository institution in connection with any reportable transaction to which paragraph (a)(2)(i) applies, to submit (in addition to any report required under this subchapter with respect to the reportable transaction) a written notice to the Secretary that the financial institution or nonfinancial trade or business failed to provide any copy of such report.

(3) For purposes of paragraph (a)(2) of this section, the term *reportable transaction* means any transaction involving funds (as the Secretary may describe in the regulation or order) the total amounts or denominations of which are equal to or greater than an amount which the Secretary may prescribe.

(b) An order issued under paragraph (a) of this section shall be directed to the Chief Executive Officer of the financial institution or nonfinancial trade or business and shall designate one or more of the following categories of information to be reported: Each deposit, withdrawal, exchange of funds or other payment or transfer, by, through or to such financial institution specified in the order, which involves all or any class of transactions in funds equal to or exceeding an amount specified in the order.

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(d)(1) No order issued pursuant to paragraph (a) of this section shall prescribe a reporting period of more than 180 days unless renewed pursuant to the requirements of paragraph (a).

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(e) No financial institution or nonfinancial trade or business or officer, director, employee, or agent of a financial institution or nonfinancial trade or business subject to an order under this section may disclose the existence of, or terms of, the order to any person except as prescribed by the Secretary.

Dated: November 5, 2021.

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[FR Doc. 2021-24602 Filed: 11/12/2021 8:45 am; Publication Date: 11/15/2021]